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ABSTRACT

In remarks before the Delaware Bar Association, United States Assistant Attorney General William Bradford Reynolds discusses the Reagan Administration's policies on civil rights. He first reviews past court decisions, which first continued to support racial discrimination and then sought to abolish it, and summarizes the eventual development of a consensus that such discrimination was intolerable. He then examines cases to demonstrate the Reagan Administration's enforcement record in the civil rights area. However, he points out two forms of relief that the Administration finds objectionable: (1) mandatory busing; and (2) racial quotas. Citing court precedent and research results, he suggests that busing has generated public protest and has not had positive effects on academic achievement or on attempted integration. Similarly, he notes that racial quotas and affirmative action in employment has had disappointing and negative results. He asserts that the Administration is not against desegregation, but will not deprive students of the benefits of attending schools in their own neighborhoods by insisting on a remedy that has proven ineffective; the Administration is not against affirmative action; however, it will not tolerate preferential selections that favor less qualified employees on the basis of their racial affiliation. (Author/MJL)

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Department of Justice

REMARKS

OF

WILLIAM BRADFORD REYNOLDS
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BEFORE

THE DELAWARE BAR ASSOCIATION

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CIVIL RIGHTS ENFORCEMENT IN THE REAGAN ADMINISTRATION:
THE FIRST YEAR IN REVIEW

I am pleased and honored to have been invited here today to speak to such an august and respected body of legal talent. As one who grew up in this community, I have always had nothing but the highest admiration for both the bench and bar of this State. For that reason, and also perhaps because I know so many of you personally, the opportunity to share with you some critically important observations regarding my area of responsibility in this Administration, is especially welcome.

As are most of you, I am, of course, a lawyer, and therefore, not surprisingly, I find myself all-too-often afflicted by what may be for members of our profession, a traditional inability to divorce any issue from Supreme Court decisions dealing with that issue. Given that predilliction, I am particularly fortunate in my present position, for the principal battlefield in the cause for racial equality has been the United States Supreme Court.

Let me reflect with you briefly upon the evolution in the Supreme Court of the <u>fundamental principle</u> of racial equality. I do this not only as a result of the lawyer's natural tendency to build his case on legal precedents, but also as a sobering reminder that those who ignore history are frequently condemned to repeat it.

Over 85 years ago, Justice John Harlan, the Elder, said this in dissent in Plessey v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting): "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color." The rest of the Justices disagreed with Justice Harlan's view of the Fourteenth Amendment, concluding that "in the nature of things it could not have been intended to abolish distinctions based on color . . . ." id. at 544. Thus, the Supreme Court ruled that Mr. Plessey, who was one-eighth black, could be excluded by law from the railroad car reserved exclusively for whites. In so ruling, the Court wove into the fabric of our Nation's history the shameful separate-but-equal doctrine.

Years later, in 1944, Justice Murphy wrote in Korematsu v. United States, 323 U.S. 214, 242 (1944): "Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is . . . utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." Those words, remarkably, were also written in dissent, the majority ruling that the Government is constitutionally authorized to exclude United States citizens of Japanese ancestry from certain areas in California.

The principle so forcefully articulated by Justices Harlan and Murphy, however, ultimately prevailed, and in Brown v. Board of Education, 347 U.S. 483 (1954), the Supreme Court finally overruled Plessey v. Ferguson, holding that separate educational facilities are inherently unequal. Although it was overruling more than half a century of Supreme Court jurisprudence, the court acknowledged with eloquent simplicity the primacy of the constitutional right at issue: "At stake," said a unanimous court, "is the personal interest of the plaintiffs in admission to public schools . . . on a [racially] nondiscriminatory basis." Brown v. Board of Education, 349 U.S. 294, 300 (1954).

The Brown decision spurred a judicial and legislative quest to condemn racial discrimination, both public and private, in virtually every aspect of American life. The courts have, since Brown, consistently denounced distinctions based on race as being by their very nature, in Chief Justice Stone's words, "odious to a free people whose institutions are founded upon the doctrine of equality." Loving v. Virginia, 388 U.S. 1, 11 (1966), quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

Congress has likewise made clear its abhorrence of racial discrimination, enacting initially the Civil Rights Acts of 1957, aimed at assuring equal voting rights -- and, incidently, establishing within the Department of Justice an Assistant Attorney General for Civil Rights. Following that

enactment, there came a steady flow of national civil rights legislation: The Civil Rights Act of 1960 (voting); the Omnibus Civil Rights Act of 1964 (public accommodation, school desegregation, federal programs, employment, etc.); the Voting Rights Act of 1965; and the Civil Rights Act of 1968 (fair housing) -- to name but a few of the milestones in this area. And this activity by Congress has continued through the current session where extension of the Voting Rights Act is now being debated.

Each of these important pieces of legislation assigned enforcement responsibilities to the Attorney General -- who in turn delegated them to the Civil Rights Division. Thus, over the years, the Division has initiated hundreds of enforcement actions and has participated in some of the thousands of class-actions brought by private citizens. It traditionally has been -- and most assuredly will continue to be -- on the cutting edge of the government's involvement in the effort to eliminate discrimination through federal court litigation.

The question being asked, however, is exactly what that commitment means. We are hearing with increasing vocal intensity that this Administration is insensitive to civil rights, has abandoned active enforcement of the civil rights laws, and seeks to dismantle or undo the progress of past decades. The response of "Not So" -- which comes at every occasion from the President, the Attorney General, and me -- is dismissed by our detractors, and, remarkably, by many in the media, as little more than empty rhetoric.

Rather than leave the debate in the highly charged atmosphere of emotional accusations and denials, let me share with you today in dispassionate terms what this Administration is seeking to accomplish in the civil rights area, and how we are going about doing it.

I start with a given: since 1954 our Nation has progressed in this vital area both attitudinally and statistically. Our national consciousness has been raised, and the profound injustice of discrimination on the basis of immutable and irrelevant personal characteristics, such as color, is broadly recognized and condemned. As a consequence, racial and other stereotyping is declining, and most people now accept the legal and moral imperative to treat individuals equally, regardless of race, color sex or national origin. Obviously, and sadly, there are exceptions, and enforcement action is still required. But it is most important, in my view, to appreciate that such circumstances are the exception and no longer the rule.

That we are continuing in this Administration to deal with the exceptions -- and to deal with them as vigorously and uncompromisingly as prior administrations -- is amply demonstrated by our enforcement record. Let me just tick off a few facts that never seems to get reported by those who day-in and day-out cover this most topical subject:

1. Since January 29, 1981, the Civil Rights Division has filed 43 new cases charging criminal violations of the civil rights laws and has conducted trials in 11 other cases that were previously under indictment. The cases range from wanton racial murders, to mistreatment of prisoners and arrestees, to involuntary servitude. This level of activity exceeds the "track record" of prior administrations.

2. In addition, in the past year we have filed 6 new employment cases against public employers alleging discrimination on grounds of race or sex. During the same period, 6 cases we inherited have been litigated, and in 3 others, we have obtained consent decrees. I have also authorized 8 new suits of employment discrimination which are presently being negotiated, and there are 9 other complaints we have received that are under investigation and are likely to result in lawsuits.

3. Our enforcement activity also includes the Voting Rights Act, where the level of activity in the Division over the past year far exceeds previous years. Since the change of administrations, we have reviewed more than 8400 electoral changes to determine whether they are in compliance with the Act. While most of these have been approved, there are some that have not. Falling into this latter category are the state legislative and/or congressional redistricting plans

submitted to the Attorney General for approval by the States of Texas, North Carolina, Georgia, Virginia and South Carolina. An objection was also entered to the New York City councilmanic redistricting plan. In addition, we have participated in litigation in 27 court cases seeking to assure minority voting rights.

4. In the area of school desegregation, our activity has been no less impressive. When the Administration changed on January 20, 1981, the Division had over 400 school districts under remedial court orders and a large docket of additional cases, some of which had been filed after the election but before the new Administration took office. In the past year, we have negotiated consent decrees or obtained court-ordered relief in 9 school cases, and we are currently working on 6 more. We have participated in litigation in 6 ongoing cases, and have initiated investigations into discrimination in educational-program-offerings in 3 others. In addition, we have decided to proceed in all 4 of the cases filed at the very end of the last Administration. We have also settled the statewide higher education case in Louisiana, and participated in the bilingual education case in Texas. Our largest case involves the City of Chicago which will, I believe, prove to be the first urban voluntary desegregation remedy -- and will, I predict, result in a greater degree of desegregatin of the Chicago school sytem than could have been accomplished under a mandatory busing plan.

5. One other area of activity is noteworthy. In 1980, Congress passed the Civil Rights of Institutionalized Persons Act, under which the Attorney General was given authority to bring lawsuits against state and local institutions (such as prisons, nursing homes and mental institutions) which failed to treat residents in a constitutional manner. In the past year, we have initiated 16 investigations of allegedly egregious conditions in such institutions, and just last week one state decided to close a clearly sub-par institution following our initial investigation.

This does not exhaust the list of initiatives we have undertaken to enforce the civil rights laws. But it does underscore -- on the basis of clear, irrefutable facts -- that the commitment of this Administration to strong and vigorous enforcement of the many federal statutes under my responsibility is not -- as our detractors insist -- empty rhetoric. We remain dedicated to continuing the battle being waged against discrimination based on race, and our actions demonstrate the depth and sincerity of that commitment.

Why, then, do we find ourselves embroiled in controversy over the policies that have been adopted by this Administration in the civil rights area? The answer, I believe, centers on a fundamental difference of opinion over certain of the approaches that have been taken to remedying past discrimination.

There is, I submit, general unanimity among most Americans with regard to the "end" that we all are striving to achieve. After a shameful history of ignoring the injustice of racial discrimination -- a history marked by such Supreme Court decisions as Plessey v. Ferguson and Korematsu v. United States -- a consensus developed after Brown v. Board of Education, both in Congress and in the country as a whole, that racial discrimination is wrong and should not be tolerated in any form.

My concern -- and that of this Administration -- is that certain remedies that have been developed in the past decade are threatening to dilute this essential consensus. Most Americans, I think, now support the idea that each individual should be judged on his or her merits, regardless of race. However, race-conscious remedies which require preferential treatment for minorities, or which intrude unnecessarily on the legitimate functions of local governments, are not widely supported. Indeed, in many instances such remedies have a devisive effect which tends to undermine popular support for the basic commitment to racial equality.

Consequently, this Administration has dared to reexamine some of the relief that has come to be "accepted practice" in the civil rights community. While we share fully the desired "end", we are questioning -- and, I submit, for good reason -- some of the "means" that have been employed in the past to get there. It is this inquiry that has brought forth a

round of criticims and led in some instances to disparaging, and wholly unjustified, remarks about our lack of commitment to civil rights enforement.

Let me undertake to state the case for the defense. It is not all remedial techniques in the civil rights area that we seek to improve upon; most are both sensible and effective, and we have no desire to tamper with them. Our focus has been, instead, primarily on two forms of relief that we, and many Americans, find objectionable: 1) mandatory busing, and 2) racial quotas. In both cases, we are talking about relief that was adopted almost a decade ago without any emperical evidence to suggest a likelihood of success.

With respect to mandatory busing, it first appeared as a permissible remedy in school cases in the Supreme Court's 1971 decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The Court there held, largely in reliance on untried and untested predictions of social scientists, that desegregation decrees may order race-conscious student assignment schemes that employ mandatory busing, alteration of zones, and other methods to obtain racial balance in schools. Judged ten years later against the test of time, it is clear that the experiment with mandatory busing as a remedy for de jure, or state-enforced, segregation has not fared well. Few issues have generated as much public tumult and anguish as court-ordered busing, and there is compelling evidence that mandatory transportation of students has failed to accomplish the remedial goal that Brown and Swann anticipated, namely,

an educational environment that would provide an equal opportunity for every school child, irrespective of race, to realize his or her achievement potential in accordance with industry and talent. As Attorney General William French Smith observed in his address last year to the American Law Institute:

> "The results of studies aimed at determining the benefits of busing to educational achievement are at best mixed. Some studies have found negative effects on achievement. Other studies indicate that busing does not have positive effects on achievement and that other considerations are more likely to produce significant positive influences.
>
> In addition, in many communities where courts have implemented busing plans, resegregation has occurred. In some instances upwardly mobile whites and blacks have merely chosen to leave the urban environment. In other instances, a concern for the quality of the schools their children attend has caused parents to move beyond the reach of busing orders. Other parents have chosen to enroll their children in private schools that they consider better able to provide

a quality education. The desertion of our cities' school system has sometimes eliminated any chance of achieving racial balance even if intra-city busing were ordered."

The flight from urban public schools has eroded the tax base of many cities, which has in turn contributed to the growing inability of many school systems to provide high-quality education to their students--whether black of white. Similarly, the loss of parental support and involvement has robbed many public school systems of a critical component of successful educational programs. When one adds to these realities the growing empirical evidence that racially balanced public schools have failed to improve the educational achievement of the students, the case for mandatory busing collapses.

Our examination of racial quotas as a remedy for employment discrimination has been no more encouraging. During the 1960's, minorities made significant educational and economic strides in the labor force under the statutory and decisional law outlawing discrimination and granting "make whole" relief to individual victims who could show actual injury at the hands of a discriminatory employer. 1/ That

1/ See T. Sowell, Affirmative Action Reconsidered (1975); T. Sowell, Knowledge and Decision 259-59, 355-56 (1980); R. Freeman, Black Economic Progress Since 1964, The Public Interest 52 (1978); Statement of Morris Abrams before Hatch Subcommittee on Constitutional Rights, at 9 (May 4, 1981).

such a remedial approach was fully contemplated by Congress when it passed Title VII of the Civil Rights Act of 1964 is clear from both the language and legislative history of the Act. Thus, the late Senator Hubert Humphrey, a leading advocate of social equity and racial equality, and the foremost proponent of the 1964 Civil Rights Act, decried the idea that Title VII would countenance racial quotas, remarking: "It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race should not be used for making personnel decisions." 110 Cong. Rec. 6553 (1964). In like manner, remarks by other proponents of the legislation confirmed the fact that Title VII was intended to establish a principle of "colorblindness in employment." Id. at 6564. And, in McDonald v. Santa Fe Trail Transportation Co., 422 U.S. 273 (1976), the Supreme Court interpreted Title VII to prohibit racial discrimination against white employees upon the same standards as would be applicable were they nonwhites.

Nontheless, impatience with the progress in the 1960's of minorities' efforts to achieve statistical parity with whites in the employment field, gave rise in the 1970's to the use of racial formulas, such as hiring goals and fixed quotas, designed to effectuate a certain balance among the races in the work place; and the concept of race-conscious "affirmative action" was born. This new concept of "affirmative action" discarded the notion that a preference is permissable only when necessary to place an individual victim of proven racial discrimination in a position that he or she would

have attained but for the discrimination. Rather, proponents of this view sought the granting of preferences not simply to individuals who had in fact been injured, but to an entire group of individuals, based only on their race. It mattered not that those who benefitted had never been wronged by the employer, or that the preferential treatment afforded to them was at the expense of other employees who were themselves innocent of any discrimination or other wrongdoing.

When we undertook to examine more carefully the progress made by minorities under the new regime of racial quotas, the results were disappointing. While the better educated and more affluent blacks made modest gains, the vast majority of working class blacks continued to be largely unassisted. In fact, the movement of large numbers of minorities into the workforce in the 1960's under the traditional concept of "affirmative action" embodied in Title VII of the 1964 Act was in most job categories more impressive than was the case under the quota systems of the 1970's. Attorney General Smith summarized the likely explanation in the following terms in his ALI address:

> "While well intended, quotas invariably have the practical effect of placing inflexible restraints on the opportunities afforded one race in an effort to remedy past discrimination against another. They stigmatize the beneficiaries.

Worst of all, under a quota system, today's minimum may become tomorrow's maximum."

In formulating policies in the areas of public school desegregation and equal employment opportunity, this Administration has refused to close its eyes to these experiences of the past decade. "The life of the law," Oliver Wendell Holmes once said "has not been logic, it has been experience." The Common Law. Blind allegiance to experiments that have not withstood the test of experience obviously makes little sense.

It is for this reason that we have abandoned mandatory busing and racial quotas as remedial devises in the area of civil rights. In their stead, we are pursuing relief that holds out more promise in the long run for providing enhanced education to minority students in a desegregated environment, and for bringing larger numbers of minorities into the workforce.

In this connection, contrary to some of the more critical comments, we are not against desegregation. Any student desiring to attend a pubic school with students of the opposite race should be afforded the opportunity to do so, and we will continue to ferrit out and remove any artificial barriers imposed by states or municipalities designed to defeat that result. But, at the same time, we will not deprive students of the significant benefits of attending school in their own neighborhoods by insisting on a mandatory, race-conscious transportation remedy that has proven ineffective and holds out little promise for an enhanced educational experience.

Similarly, let me state in response to our detractors that this Administration is not against "affirmative action" in its traditional sense. We fully agree that employers should take affirmative steps -- going beyond mere passive nondiscrimination -- to ensure that all barriers to employment and advancement of minorities are permanently removed, so that applicants and employees of all races are able to attain the level of achievement warranted by their industry and talent. To this end, we will insist as an element of relief for discriminatory employment practices that the employer embark on an affirmative recruitment program to bring increased numbers of qualified minorities into the pool of applicants eligible for hire on nondiscriminatory basis. But we will not tolerate preferential selections that favor less qualified employees over those who are better qualified solely on the basis of a person's membership in a particular racial group. Were we to act otherwise, we would be open to the charge that we have sought to remedy discrimination with discrimination. This, the Department of Justice will not do.

In so stating, let me re-emphasize in closing that this Administration is indeed working toward the same ultimate "end" that is shared by all Americans, both black and white alike -- i.e., the objective of racial equality that

shaped the thinking of Justices Harlan and Murphy and that served as the centerpiece of the unanimous decision in Brown. It is our firm belief that adherence to the color-blind ideal of equal opportunity for all -- the ideal that guided the framers of the Constitution and the drafters of civil rights legislation in this country -- is essential to to preserving the national consensus condeming discrimination in our schools and in the workplace, and holds the greatest promise of realizing the proclamation in the Declaration of Independence of equality for all Americans.

That is the teaching of the first year of civil rights enforcement in the Reagan Administration -- as measured by both our pronouncements and our actions -- and it will continue to be the course followed in the years ahead.

Thank you.